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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 342

WILLIAM R. DAVENA, JR., *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The District Court rendered no opinion. The opinion of the Court of Appeals (I R 22-24) is reported at 198 F. 2d 230.

JURISDICTION

The judgment of the Court of Appeals was entered on June 27, 1952. (IR. 25.) A petition for

rehearing was denied on August 18, 1952. (IR. 26.) The petition for a writ of certiorari was filed on September 17, 1952. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Were the extra-judicial admissions of petitioner properly admitted in evidence?

2. Was a proper point of beginning established for computation of petitioner's income on the net worth increase theory?

3. Did the proof establish that petitioner owed taxes over and above the amount reported?

STATUTE INVOLVED

INTERNAL REVENUE CODE:

SEC. 145. PENALTIES.

* * * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law,

be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * * *

[26 U.S.C. 145.]

STATEMENT

Petitioner was tried in the United States District Court for the Northern District of California on a three-count indictment charging that he had wilfully attempted to defeat and evade a large part of the income taxes due and owing by him and his wife for the years 1944, 1945, and 1946, respectively (IR. 4-6). He was convicted on all three counts, and was sentenced to imprisonment for 30 months on each count, the sentences of imprisonment to run concurrently, and to pay a fine of $2,500 on count three (IR. 7-9).

The indictment charged that petitioner filed false and fraudulent joint income tax returns for himself and his wife, and that these returns reported income and paid tax as shown in the first two columns of the following tabulation, whereas his correct income and tax were as shown in the last two columns thereof (IR. 4-6):

	Reported Income	Reported tax	Correct Income	Correct tax
1944 ..	$3,475.00	$262.97	$7,244.92	$1,206.03
1945 ..	2,972.87	253.76	6,328.52	1,085.26
1946 ..	3,620.00	240.00	14,354.88	3,374.96

During the years 1944 to 1946 petitioner was Chief of the Police and Fire Departments of the City of Benicia, California (IIR. 64, 70), for which services he received a salary, and in addition, after September 3, 1946, a monthly payment of $40 for maintenance of his automobile (IIR. 65, 66). He reported as income on his tax returns only the salary received from the City of Benicia and small fees for the service of legal papers (IR. 23; IIR. 88.)

Jerry Robinson, a prostitute, testified that during the period 1944 to 1946 she had given petitioner $300 to $400 for favors (IR. 23; IIR. 33, 36). Donald J. Thurman, Special Agent of the Bureau of Internal Revenue, testified that petitioner had stated on several occasions that he received money from a madam named Jerry Robinson, and generally from gamblers and prostitutes during the years 1944 to 1946 (IR. 23; IIR. 81, 82, 88, 89, 116, 117, 118, 120); that he kept no record of this income, which he called "promotion" income (IIR. 83); and that a portion of it was used to liquidate a mortgage on his home in the amount of $3,758.66 and an additional portion, in the amount of $6,000, was deposited to a savings account with the Bank of America in Vallejo, California (IIR. 41, 89). Agent Thurman testified that petitioner had said that he established this bank account in Vallejo because he "didn't want the local people to know that he had more

money coming in than would be accounted for by his salary" (IIR. 83). Petitioner estimated his income from sources other than his salary at approximately $2,000 a year and stated that his income tax returns for the years 1944, 1945 and 1946 had understated his income to the extent of approximately $2,000 a year (IIR. 88).

In the absence of records (IIR. 83), the Government prosecuted the case by showing annual increases in petitioner's net worth and by comparing these figures with income reported by petitioner (IR. 24). Petitioner's net worth at the beginning of the period, December 31, 1943, was established by valuing assets held by him at that time. (IR. 24.) Evidence establishing his net worth at the end of each of the years 1943 to 1946, inclusive, was received as follows:

(1) Frank Bernardo, manager, Bank of America, Benicia, California, testified (R. 38-39) that the balances in petitioner's savings and commercial accounts at that bank were as follows:

	Savings Account	Commercial Account
December, 31, 1943 ..	$ 504.08	$ 635.60
December 31, 1944 ..	920.39	791.30
December 31, 1945 ..	929.61	1,061.60
December 31, 1946 ..	1,090.05	847.42

He also testified that petitioner purchased a cashier's check for $3,758.56 in cash on December 7, 1945. (IIR. 39-40.)

(2) Robert E. Arvedi, officer of the Bank of America, Main Branch, Vallejo, California, testified that petitioner opened a savings account at his bank on July 15, 1946, depositing $6,000 in cash at that time, and that the balance of that account on December 31, 1946, was $6,000. (IIR. 40-42.)

(3) Gary Rees, manager of the Solano County Title Company, Solano, California, testified that his records showed the receipt of a cashier's check of $3,758.66 on December 8, 1945, from Davena, which amount was paid to Eduardo A. Silveira and his wife by the company in satisfaction of the balance due on the sale price of 127 West "J" Street, Benicia. (IIR. 42-44.)

(4) Mrs. Leonora F. Silveira testified that she owned the seller's interest in the 127 West "J" Street property, having acquired it on July 1, 1943, when the balance due on the purchase of that property by Davena was $4,913. She stated that Davena thenceforth paid $35 a month principal and interest until December 5, 1945, when he informed her that he wanted to pay the balance; and that she received a check therefor out of escrow on April 12, 1946. (IIR. 45-47; Govt. Ex. 7.)

(5) Mary Russold testified that her husband made certain improvements to the Davena resi-

dence, and that $750 was paid in the latter part of 1945 and $400 in January 1946 by Davena for such work. (IIR. 48-49.)

(6) Genevieve Bennett testified that she had sold petitioner a house at 125 West "J" Street, Benicia, California, in the latter part of 1946 or not later than January 1947 for a total price of $7,150, which was paid in cash. (IIR. 51-52.)

(7) E. R. Tretheway, credit manager, Earl C. Anthony, Inc., San Francisco, California, testified that his company delivered a Packard automobile to the City of Benicia on May 31, 1944, at a total cost of $2,172.91, and it was then stipulated by counsel that the automobile had been purchased by petitioner and paid for by him from his own funds. (IIR. 56, 58.)

(8) Frank Coronado, automobile dealer, Coronado, California, testified that petitioner purchased a Packard automobile from him on September 11, 1946, for $2,671.53, less trade-in allowance of $1,268 on a 1942 Packard, and that petitioner paid the difference in cash. He further stated that he repurchased the same automobile from petitioner on April 20, 1948, for $2,500. (IIR. 59-61.)

(9) Donald J. Thurman, Special Agent of the Bureau of Internal Revenue, testified that he examined petitioner's safety deposit box at the Bank of America, Benicia, on February 23, 1949,

and found therein War Bonds of the face amount of $100 purchased in 1942 and 1943, of $125 purchased in 1944, and of $100 purchased in 1945, and that the purchase price was three-fourths of the face amount. (IIR. 77-78.) He also stated that petitioner told him that he had purchased these bonds from his own funds, and that they were in the joint names of petitioner and his minor children or his wife. (IIR. 79.)

(10) Mr. Thurman further stated that he made an investigation to determine the liabilities of petitioner at the end of the years 1943 to 1946, inclusive, but was unable to find any, except the loan payable to Eduardo Silveira, which had been made in connection with the purchase of his residence. (IIR. 156.)

(11) Robert W. Davis, Deputy Collector of the Bureau of Internal Revenue, testified that he investigated a claimed gift or inheritance to petitioner from his mother, and found that there was no probate record of such an estate in the county of her residence. (IIR. 165-166.)

He further testified that he made an investigation with respect to charge accounts which petitioner may have maintained, but found no such accounts with firms with which petitioner had stated he had dealt. (IIR. 166.)

(12) John H. Reedy, Deputy Collector of the Bureau of Internal Revenue, testified that the

records of his office showed that petitioner paid taxes of $285.60 in 1944, $270 in 1945, and $188.80 in 1946, and that he received a refund of 1943 taxes in 1944 of $52.51, a refund of 1944 taxes in 1945 of $22.63, and a refund of 1945 taxes in 1946 of $16.24. (IIR. 32; Govt. Ex. 1, 2, 3, 4.)

(13) Augustus V. Brady, Technical Advisor, Penal Division, Office of the Chief Counsel, Bureau of Internal Revenue, testified as an expert witness as to the computation of allowable depreciation on automobiles used for business purposes and as to the computation of income by the net worth method. (IIR. 183 *et seq.*) According to his computations, depreciation would be allowable to petitioner in the respective amounts of $334.52 for the year 1944 (IIR. 184-185); $402.12 for 1945 (IIR. 186); and $490.83 for 1946 (IIR. 186-187).

In addition to the foregoing evidence of net worth, substantially all of which was independent of petitioner's admissions, the Government introduced in evidence a document (Govt. Ex. 9) prepared by petitioner and delivered to the investigating agents by Hartley Russell, petitioner's tax advisor (IIR. 93). This document was subsequently discussed with Mr. Thurman and Mr. Davis, investigating agents, by petitioner and Mr. Russell and some changes made thereon by petitioner in his handwriting, after which he signed it. (IIR. 94.) The document consisted of a

schedule of petitioner's net worth and set forth his assets during the years in question (11R. 96-99). Petitioner stated he had no liabilities after 1943. (11R. 99.) He also stated that he had no currency on hand; that he wasn't the kind of person to keep cash in his safe deposit box, and that he never had very large sums of currency on hand at any time. (11R. 82.)

In an interview on February 23, 1949, petitioner stated to Mr. Thurman that three years prior he had received $5,000 from his father, which was money that had been left to him by his mother at the time of her death, and that he spent the money shortly after receiving it. (11R 80.) On December 7, 1949, after signing the schedule of net worth (Govt. Ex. 9), he stated with respect to this claim, "That is a lie. I never got anything." (11R. 100, 166.)

The petitioner presented no witnesses and did not testify.

ARGUMENT

I

1. Petitioner's contention (Pet. 25-41) that there was insufficient proof of an evasion of income taxes to warrant the admision into evidence of his extra-judicial admissions to the revenue agents is without merit.

The evidence clearly showed, through the testimony of a person who had been engaged in

prostitution, that while she was so engaged petitioner had received from her substantial amounts in return for favors during the years 1944 to 1946 (HR. 23; HR. 33, 36). No part of this income was reported in petitioner's income tax returns (Gov't Exs. 2, 3, 4). This evidence was plainly sufficient to corroborate petitioner's admissions that he had received money from other prostitutes and from gamblers during the relevant period. Moreover, the testimony of various witnesses showed increases in petitioner's net worth during the applicable period through his acquisition of various assets, including houses and improvements thereof, automobiles, war bonds, and new and increased bank deposits. This testimony proved increases in net worth independently of petitioner's admissions (see *supra*, pp. 5-9), and was amply sufficient to corroborate petitioner's admissions to the revenue agents concerning the items mentioned in the testimony, as well as his admissions concerning other items such as a $1,255 fur coat and approximately $3,000 worth of furniture (HR. 97-98).

There is no substance in petitioner's argument that the burden was on the Government to adduce more direct evidence proving that he evaded his income taxes before his extra-judicial admissions could be properly admitted in evidence. The direct evidence presented by the Government showed that petitioner had received income from

a questionable source which he had not reported, and also showed increases in his net worth in excess of the income that he had reported. This was plainly substantial evidence that he had evaded some portion of his income taxes, and it was all that was needed, since it was ample to corroborate his admissions to the revenue agents. It has long been established that the *corpus delicti* need not be completely shown by evidence *aliunde* the defendant's confessions or admissions. Thus, extrajudicial confessions and admissions may be properly admitted where other substantial evidence of the crime is shown. *Daeche* v. *United States*, 250 Fed. 566, 571 (C.A. 2); *Wiggins* v. *United States*, 64 F. 2d 950, 951 (C.A. 9), certiorari denied, 290 U.S. 657; *Bell* v. *United States*, 185 F. 2d 302 (C.A. 4); *Brodella* v. *United States*, 184 F. 2d 823 (C.A. 6); *Gendelman* v. *United States*, 191 F. 2d 993, 996 (C.A. 9); *United States* v. *Hornstein*, 176 F. 2d 217 (C.A. 7); *United States* v. *Yeoman-Henderson, Inc.*, 193 F. 2d 867 (C.A. 7); *Chevillard* v. *United States*, 155 F. 2d 929, 935 (C.A. 9); *D'Aquino* v. *United States*, 192 F. 2d 338, 357 (C.A. 9).

Petitioner's reliance on the case of *United States* v. *Fenwick*, 177 F. 2d 488 (C.A. 7) is misplaced. The facts in the *Fenwick* case were materially different from the facts in the case at bar. In the *Fenwick* case there was no evidence whatever of unreported or undisclosed income. In

the case at bar there was direct evidence that petitioner received income which he did not report or disclose (*supra*, p. 4).

The materiality of a showing of unreported or undisclosed income was emphasized by the Court of Appeals for the Seventh Circuit in the case of *United States* v. *Yeoman-Henderson*, 193 F. 2d 867, 869, in which that court restricted its general statements in the *Fenwick* case to the facts of that case, and then applied the prevailing corroborating evidence rule. Hence, the *Fenwick* case does not support petitioner's contention, since the general statements therein upon which he relies have, in effect, been disavowed by the court that uttered them. In the circumstances, there is no existing conflict between the rule of the Seventh Circuit and that of the court below.

2. Petitioner contends that the beginning point for computation of his net worth increase was not established and that the evidence failed to exclude all possible sources of income from which his increase in net worth and excess expenditures could have been derived.

The agents of the Bureau of Internal Revenue testified to the comprehensive investigation they had conducted in attempting to ascertain the nature and sources of petitioner's assets and liabilities at the end of each year, 1943 to 1946. This evidence was supported by proof of his assets beginning on January 1, 1944, from testi-

mony of the persons with whom he had done business. Mr. Davis, a Deputy Collector of Internal Revenue, testified that he investigated the claimed gift or inheritance to petitioner from his mother and found no probate record of such an estate in the county of decedent's residence. (IIR. 165-166.) Coupled with the direct evidence of his net worth at the beginning of 1944 and the end of each year thereafter were petitioner's admissions that he never had any large sums of money on hand at any time (IIR. 82), and the signed schedule of his net worth (Govt. Ex. 9).

Petitioner did not attempt to prove, and does not now allege, that he had any accumulation of assets at the end of 1943 from which the subsequent increase in his net worth could have been derived.

In the absence of records the Government, of necessity, resorted to proof of his unreported income by indirect method. Insofar as it is possible to do so, the Government's proof excluded the possibility that the expenditure of funds was from assets accumulated and secreted in prior years. *Cf. Bryan* v. *United States*, 175 F. 2d 223 (C.A. 5). The Government had no further burden to prove facts which petitioner knew or should have known, and the record stands complete without one shred of credible evidence in his favor.

As stated in *Gariepy* v. *United States*, 189 F. 2d 459, 463 (C.A. 6):

> The defensive strategy of the appellant was to remain silent and challenge the government to prove its case. This, of course, he had a right to do but he now urges, upon appeal, that the government had an obligation to establish beyond reasonable doubt that there were no resources other than current taxable income with which to make the substantial expenditures of the prosecution years. * * * The argument borders on the fantastic * * *.

See also *United States* v. *Chapman*, 168 F. 2d 997 (C.A. 7), where the defendant had stipulated the items of assets at the beginning of the net worth period; and *Jelaza* v. *United States*, 179 F. 2d 202 (C.A. 4); *Schuermann* v. *United States*, 174 F. 2d 397 (C.A. 8); *Bell* v. *United States*, 185 F. 2d 302 (C.A. 4); *United States* v. *Hornstein*, 176 F. 2d 217 (C.A. 7); *Himmelfarb* v. *United States*, 175 F. 2d 924 (C.A. 9).

The evidence here was clearly sufficient to warrant an inference by the jury that petitioner had no prior accumulation of funds and had received no non-taxable funds during the prosecution years with which he could have increased his net worth, and the evidence also established a source of a portion of the additional funds from which the jury might infer that other income of a like nature was received.

II

Petitioner contends generally that the proof was insufficient to establish that a "substantial" portion of the tax was knowingly and wilfully defeated and evaded.

The statute under which petitioner was prosecuted, Section 145(b), Internal Revenue Code, *supra*, pp. 2-3, uses the language: "* * * Any person who willfully attempts in any manner to evade or defeat *any* tax imposed by this chapter * * *." (Italics supplied.) There is no dispute that the Government has the burden of proving that petitioner owed more tax than he paid. *United States* v. *Schenck*, 126 F. 2d 702 (C.A. 2); *Gleckman* v. *United States*, 80 F. 2d 394 (C.A. 8); *O'Brien* v. *United States*, 51 F. 2d 193 (C.A. 7). But the amount of the tax is not the gist of the offense and it is not essential that it be proved in the exact amount charged. *United States* v. *Schenck*, *supra*. As stated in *Cooper* v. *United States*, 9 F. 2d 216, 224 (C.A. 8): "It was necessary only that it should appear that *some* amount was due, and that the returns were knowingly false and fraudulent in that respect". (Italics supplied.)

Petitioner contends that there was no substantial understatement of income if the Government must rely simply upon the testimony of Jerry Robinson that she had given petitioner $300 or $400 for favors. It should not be expected that actual financial transactions of such an illicit

business would appear by direct proof. *United States* v. *Johnson,* 319 U.S. 503. The Robinson testimony established the possible source of the additional funds, from which testimony the jury could infer that petitioner had received other payments of a like nature from unknown persons in similiar occupations. To establish the amount so received the Government did not rely solely upon the testimony of Jerry Robinson, but established the receipt of additional income through competent evidence as to his increase in net worth. The expert witness for the Government testified in response to hypothetical questions that petitioner had income of $7,237.19 in 1944 (IIR. 189) and owed a tax of $1,070.60 (IIR. 190); that he had income of $5,636.64 for 1945 and owed a tax of $899.16 (IIR. 192); and that he had income of $14,536.61 for 1946 (IIR. 194) and owed a tax of $3,586.95 (IIR. 195). These amounts are all substantially in excess of the taxes reported for these years, the latter being $262.97, $253.76 and $240, respectively (*supra,* p. 3).

CONCLUSION

The decision of the court below is correct and further review is not warranted. It is respectfully submitted therefore that the petition for a writ of certiorari should be denied.

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